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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DAWNDEE LYNN ROSSY,

Defendant and Appellant.

E068385

(Super.Ct.No. SICRF1355062)

OPINION

APPEAL from the Superior Court of Inyo County. Phillip J. Argento, Judge.  
(Retired judge of the Los Angeles Super. Ct., assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Kristen  
Ramirez, Deputy Attorneys General, for Plaintiff and Respondent.

After a bench trial, the court found Dawndee Lynn Rossy guilty of embezzling over \$1.5 million from her former employer, Inyo County Health and Human Services, and sentenced her to nine years in prison. On appeal, Rossy argues the trial court abused its discretion by granting her retained counsel's motion to withdraw over her objection, months before trial. She argues the error is reversible per se because it violated her Sixth Amendment right to counsel of her choice. We conclude the court did not err, and therefore affirm.

## **I**

### **FACTS**

#### *A. Investigation and Charges*

In January 2013, law enforcement interviewed Rossy about allegations of embezzlement at the Inyo County Health and Human Services Department (HHS). During that videotaped interview, Rossy confessed to misusing her position as a supervisory welfare worker to steal thousands of dollars a month in welfare funds for several years. She confessed she had been creating fictitious welfare accounts (and, at least in one case, stealing the identity of someone she knew), then taking the money issued to those accounts. She would use her work computer to create a welfare account with a fake name, put the name in the system, "run it through," and let the benefits "roll" on the account. She would then go to various ATMs throughout town, withdraw money using the fraudulent welfare debit cards issued for the fake accounts, and deposit the funds into her personal bank account. She shredded the statements and letters she

received on the fake accounts and would not keep those accounts open for a long period of time. She said her husband, co-defendant Ken Rossy, knew about her conduct, accepted the stolen funds she had obtained from the cards, and occasionally used the cards himself. She admitted she had “totally fucked up,” but claimed she had only created 10 or 12 fake accounts and that the most money she ever took in one month was one or two thousand dollars.

The subsequent investigation corroborated Rossy’s confession, but also revealed embezzlement on a much larger scale. Surveillance photographs and videos showed her withdrawing cash using various fraudulent welfare debit cards. A search of her office, computer, and HHS storage turned up hundreds of fraudulent documents, including copies of fictitious social security cards and birth certificates, as well as a welfare debit card printer. With the help of HHS personnel, law enforcement located 34 fictitious welfare accounts.

The Inyo County District Attorney charged Rossy and her husband with 137 counts alleged to have been committed during her time as supervisor.

B. *Counsel’s Motion to Withdraw*

In October 2013, Rossy retained the Law Office of Michael Berger to defend her. She paid a flat rate of \$50,000 for representation “through one criminal trial or sentencing in the event of conviction or plea bargain.” The retainer agreement said in relevant part that Rossy could discharge the firm at any time and the firm could withdraw from representation “for good cause,” which included situations where Rossy “refus[ed] to

cooperate with” the firm or refused to follow the firm’s “advice on a material matter or any fact or circumstance that would render [the firm’s] continuing representation unlawful or unethical.”

Berger moved to suppress Rossy’s confession, but the trial court ruled it was admissible. At an ex parte hearing in June 2014, the court told Rossy, “I think that Mr. Berger’s representation of you has been extraordinary. He came up with a theory of suppression that I had not seen before and I ended up rejecting it, but it showed an aggressive high level intellectual approach to trying to take an otherwise very difficult situation of statements you made in that taped interview and to suppress them, which would—if the result had gone the other way, that would have been very beneficial.”

Around that same time, during the summer of 2014, Berger negotiated with the prosecutor and obtained a final plea bargain offer of 11 years in prison. After initially refusing the offer, Rossy later agreed to accept it, but then changed her mind again and rejected it. On June 19, 2014, Berger sent Rossy a five-page letter, setting out his reasons why refusing the plea offer was a poor strategy. He reminded her she was facing a maximum sentence of over 48 years. At that point, trial was scheduled for October 2014.

On August 21, 2014, Berger filed a motion to withdraw from representing Rossy. In his supporting declaration, he said there had been an “irreversible breakdown in the attorney-client relationship” such as to render his continued representation ineffective. He said Rossy had “declared a lack of confidence” in his work by written and oral communication and had breached his retainer agreement, plus he believed there were

bases to support both mandatory and permissive withdrawal under the California Rules of Professional Conduct. He explained his assertions were “purposely general so as to protect Ms. Rossy’s confidential communications.”

On August 25, 2014, the trial court held an ex parte hearing on the motion. Rossy and Berger both confirmed the issue was not financial. Rossy said she opposed the motion and wanted Berger to continue representing her. The court explained the withdrawal procedure and the various grounds for withdrawal under the Rules of Professional Conduct to Rossy and informed her that, if it granted Berger’s motion, it would allow her to find and retain substitute counsel or appoint counsel for her if she was indigent. Berger said he would not divulge specifics about the attorney-client conflict unless the court ordered him to do so “because it will prejudice my client and you are the trial judge.” Berger said he would defer to the court on the issue. “I have looked at this long and hard. It’s a very serious issue and not one that I am pleased about, but having said that, I believe my representations are sufficient for you to grant my request for withdrawal.” Rossy said she “had no problem” with Berger giving the court more specific reasons to support his motion. “He can go ahead and lay out whatever he needs to lay out. I would like to have a chance to respond to that, though.” The trial court ordered Berger to submit a declaration under seal elaborating on his grounds for withdrawal and ordered Rossy to submit a responsive declaration under seal.

Berger filed a confidential declaration explaining how, in his opinion, he and Rossy had reached a place of irreconcilable conflict. We will not go into the specifics of

Berger's reasons for reaching that conclusion. For our purposes, it will suffice to say that, according to Berger, Rossy had asked him to employ unethical litigation tactics and had accused him of placing his financial interests above his duty to zealously defend her.

Berger added to his declaration that he believed neither Rossy nor the People would suffer prejudice if the court granted his motion. "The trial date has been vacated" and "Ms. Rossy can avail herself of new counsel to work with her." "If Ms. Rossy believes that she has redress relative to the fee her family paid me, that issue can be raised in another, civil forum or with the State Bar. In either case, I am prepared to demonstrate that I have earned the fee and have served her ethically and professionally to date."

Rossy filed an opposing declaration, denying having done any of the things Berger had accused her of doing in his declaration. She said she had simply disagreed with Berger's assessment of her case and decided to reject the plea offer and go to trial. Rossy accused Berger of seeking withdrawal to promote his own financial interests. She said she could not afford to hire another attorney and felt it was unfair to be forced to proceed with an appointed attorney. She attached various recent emails between her and Berger regarding the plea offer and trial strategy.

On September 8, 2014, the trial court held another in camera hearing on the motion. It announced its tentative decision to grant the motion to withdraw, but asked Rossy if she wanted to be heard further. Rossy said she had nothing to add. The court granted the motion and later appointed counsel for Rossy.

### C. *Verdict and Sentence*

The 11-day bench trial began on February 22, 2016 and concluded on June 28, 2016. The court found Rossy had stolen over \$1.5 million from HHS. It found her guilty of over 80 counts and sentenced her to a total of nine years in state prison, consisting of three years for misappropriating public funds (count 7), plus two consecutive three-year terms for two great taking enhancements. (Pen. Code, §§ 186.11, subd. (a)(2) & 12022.6, subd. (a)(3).) The court either stayed or ordered concurrent all other counts and enhancements.

## II

### ANALYSIS

Rossy argues the trial court erred in granting Berger’s motion and thereby violated her Sixth Amendment right to retain counsel of her choice. We disagree.

“Code of Civil Procedure section 284 is a general statute that governs the withdrawal or substitution of counsel in both civil and criminal cases.” (*Lempert v. Superior Court* (2003) 112 Cal.App.4th 1161, 1171, citing *In re Haro* (1969) 71 Cal.2d 1021, 1029.) Under that provision, an attorney “may be changed at any time before or after judgment or final determination . . . [¶] . . . [¶] [u]pon the order of the court, upon the application of either client or attorney, after notice from one to the other.” (Code Civ. Proc., § 284.) “‘Having undertaken the defense of a criminal case an attorney must continue with his services until he is released by the client or by the court. He may apply to the court for release from further services and for good cause shown may be

released.’” (*People v. Prince* (1968) 268 Cal.App.2d 398, 406 (*Prince*).) “If the defendant refuses to consent to a substitution of counsel, counsel who wishes to withdraw must move for an order allowing withdrawal, citing one of the grounds for withdrawal in Cal Rules of Prof Cond 1.16.” (Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2d ed. 2019) § 3.1, p. 49.)

Rule 1.16 of the Rules of Professional Conduct requires withdrawal if the lawyer learns the client is “conducting a defense [or] asserting a position in litigation . . . without probable cause and for the purpose of harassing or maliciously injuring any person.” (Rules Prof. Conduct, rule 1.16(a)(1).) The rule permits withdrawal if the client “insists upon presenting a claim or defense in litigation . . . that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law” or “renders it unreasonably difficult for the lawyer to carry out the representation effectively.” (Rules Prof. Conduct, rule 1.16 (b)(1), (4), (5).)

Trial courts have wide latitude to decide motions to withdraw, and we will reverse their rulings only upon a “clear showing of abuse of discretion.” (*People v. Sanchez* (1995) 12 Cal.4th 1, 37; *People v. Garabito* (1966) 244 Cal.App.2d 549, 555 [trial court may relieve counsel upon “a sufficient showing or good reason to believe that the right to the assistance of counsel would be substantially impaired . . . in case the request is not granted, and within these limits there is a field of discretion for the court”].) A court will generally grant a motion to withdraw based on good cause so long as it is timely made and does not “prejudice[] the defendant, the prosecution, or the smooth course of



administration of justice.” (*Prince, supra*, 268 Cal.App.2d at p. 406; *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4 [court has discretion to deny attorney’s request to withdraw when withdrawal would result in an injustice or cause undue delay]; *People v. Murphy* (1973) 35 Cal.App.3d 905, 921 [denying withdrawal request made two days before trial as untimely, noting “[t]his is far different from a situation where a motion to withdraw counsel is timely made *before the case is set for trial*”], italics added; *People v. Collins* (1966) 242 Cal.App.2d 626, 636 [trial court properly refused to permit defense counsel to withdraw on the day of trial].)

Here, the record supports the conclusion Berger had good cause for withdrawing and permitting him to do so would not harm Rossy or the prosecution. Berger told the court Rossy was demanding he pursue what he viewed as an unethical defense strategy. He also told the court Rossy had declared a lack of confidence in his representation. He said her conduct had caused an irreparable breakdown in the attorney-client relationship, leading him to conclude he could no longer effectively represent her. Based on these statements, the court could reasonably conclude Berger had, at the very least, grounds for permissive withdrawal. As Berger described Rossy’s conduct, she had “insist[ed] upon presenting a . . . defense . . . not warranted under existing law” and had made it “unreasonably difficult for [him] to carry out the representation effectively.” (Rules Prof. Conduct, rule 1.16 (b)(1), (4), (5).)

The court could also reasonably conclude that allowing Berger to withdraw would not harm either party or disrupt its calendar, because Berger made his request well before

trial. The court had originally set the trial date for October 2014, but had vacated that date by the time Berger filed his motion in August 2014. Trial began in late February 2016, which gave Rossy's appointed counsel ample time to confer with her and get up to speed. Thus, Berger's withdrawal did not unfairly delay the People's prosecution of Rossy or force her to go to trial with underprepared counsel.

Rossy argues the court abused its discretion and should not have allowed Berger to withdraw. According to her, this case comes down to whether an attorney can abandon their client simply because the client demands her right to trial and refuses to plead guilty. (See *People v. Frierson* (1985) 39 Cal.3d 803, 814 [defendant retains ultimate control over fundamental decision of whether to plead guilty or go to trial].) She argues Berger, not she, caused the problems in their relationship, and only then as a ploy to get out of the case once he realized it was going to trial. She characterizes Berger's declaration as a personal attack on her character, arguing that "neither mistrust nor quarrels over tactical matters constitute an irreconcilable conflict."

These arguments misunderstand the scope of our review on appeal. It is the trial court's role, not ours, to determine which party is more credible. That the trial court granted Berger's motion means it believed his version of the attorney-client relationship over Rossy's and credited his opinion that they had reached a place of irreconcilable conflict. Such determinations fall within the trial court's domain, and we will accept them when based on substantial evidence, which in this case is the attorney's

declaration.<sup>1</sup> (See *People v. Smith* (1993) 6 Cal.4th 684, 696 [“To the extent there was a credibility question between defendant and counsel at the [*Marsden*] hearing, the court [is] ‘entitled to accept counsel’s explanation’”].)

Citing *Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656, Rossy argues the trial court should have subjected Berger’s declaration to “heightened scrutiny” because he was seeking *permissive* withdrawal under the Rules of Professional Conduct. Rossy takes this phrase out of context. *Rus* involved the different inquiry of whether an attorney who withdraws for permissive reasons “might qualify for a quantum meruit claim [against his client for fees] later.” (*Id.* at p. 675.) It is at that later stage, not the initial withdrawal, where trial courts should apply heightened scrutiny “to determine whether counsel’s withdrawal was justified *for the purpose of awarding fees.*” (*Ibid.*, italics added; see also *Estate of Falco* (1987) 188 Cal.App.3d 1004, 1014 [“While a personality clash between the parties may provide good reason for allowing the attorney to withdraw, it is not necessarily a justifiable reason for purposes of awarding fees”].) We have carefully reviewed the record and it contains nothing to suggest the trial court failed to give the matter due consideration or closely consider Berger’s reasons for withdrawal.

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<sup>1</sup> Throughout her briefs, Rossy charges Berger with “reprehensible” conduct for “spilling [her] confidences to obtain permission to withdraw.” This mischaracterizes the record. In both his motion and at the first in camera hearing, Berger reminded the court of his duty to protect Rossy’s confidences and asked for permission to keep his reasons for withdrawal vague. He provided more specificity only after the court ordered him to do so, which was after Rossy told the court she had no objection to such a procedure.

Rossy may be of the staunch belief Berger abandoned her because she would not listen to his advice and accept the plea offer, but that is not the reason Berger gave for seeking withdrawal. That the court believed Berger over Rossy is a credibility determination, not an abuse of discretion.

### **III**

#### **DISPOSITION**

We affirm the judgment.

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SLOUGH  
Acting P. J.

We concur:

RAPHAEL  
J.

MENETREZ  
J.